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547-543—74——1

In the Supreme Court of the United States

OCTOBER TERM, 1973

No.

UNITED STATES OF AMERICA, PETITIONER

v.

JOHN ALFRED HAMILTON

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App. A, *infra*) is reported 490 F. 2d 598.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*) was entered on January 2, 1974. A petition for rehearing was denied on March 18, 1973 (App. C, *infra*). On April 10, 1974, Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari to May 17, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the rationale of *Terry* v. *Ohio*, permitting temporary detention, questioning, and searching of the person upon reasonable suspicion not amounting to probable cause, sustains the lawfulness of limited searches of property upon such reasonable suspicion.

2. Whether *Aguilar* v. *Texas* and *Spinelli* v. *United States* should be applied to require the suppression of contraband found by lifting the plyboard covering of an open truck bed, pursuant to investigation of detailed information supplied by a reliable informant; and, if so, whether those cases should be limited.

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT

After a jury-waived trial in the United States District Court for the Southern District of California, respondent was convicted of possessing 264 pounds of marijuana with intent to distribute, in violation of 21 U.S.C. 841(a)(1).[1] Respondent was sentenced to three

[1] Respondent was acquitted on a second charge of illegal importation.

years' imprisonment; all but 120 days were suspended, and respondent was placed on probation for three years. The court of appeals reversed on the ground that government agents lacked probable cause to search respondent's truck, in which the contraband drug involved in the case was secreted.

The evidence showed that at 4:30 p.m. on August 12, 1972, Agent Walker of the Bureau of Customs at Calexico, California, received a phone call from Border Patrol Agent Fernan. As Agent Walker later testified (H. Tr. 6) [2]:

> [Agent Fernan] indicated that he had just talked to an informant of Special Agent Ted Miller. This informant showed him a vehicle parked * * * at the intersection of Seventh and Imperial Avenue in Calexico [California], and it was described as a 1959 [3] Chevrolet pickup truck bearing California license G–23731. The informant indicated that there was a false compartment in the bed of this vehicle, and that it contained an unknown quantity of marijuana.

Fernan also advised Walker that the pickup was brown in color (H. Tr. 12–13).

The informant who had relayed the information to Fernan had provided reliable information five times previously as to drug offenses, which resulted in several convictions. No evidence was introduced, however,

---

[2] The testimony at the trial and suppression hearing as to the informant's "tip" came from Agent Walker. Agent Fernan had, at the time of trial, been transferred to Buffalo, New York (Tr. 63). "H. Tr." refers to the transcript of the suppression hearing; "Tr." refers to the transcript of trial.

[3] Agent Walker later said that he had misspoken as to the vintage of the truck. He had been told the truck was a 1963 or 1964 model. Later, when he found the truck, it proved to be a 1959 model (H. Tr. 11).

demonstrating the circumstances in which the informant obtained his information (Tr. 6–7).

Walker's office in the United States Customs Office is directly across the street from where the informant had shown Fernan the truck; however, when Walker looked out his window, the truck was gone (H. Tr. 7; Tr. 52). After searching for the truck in Calexico, Agent Walker drove north on Highway 111 for some 12 or 14 miles in an unsuccessful attempt to find the truck, then returned to Calexico. On the way back, at about 5:00 p.m., he "made a radio call to the port of entry, and they in turn put the information out * * *" (Tr. 66; see also H. Tr. 7–8; Tr. 52). The radio alert described the truck according to the information received by Agent Walker and specifically advised "[t]hat the truck had a secret compartment built under the bed of the truck, and that it contained marijuana" (H. Tr. 15).

Among those receiving the radio alert were Border Patrol Agents LeMon and Salinas at a checkpoint on California Highway 86, some 12 miles south of Salton City, California, which is approximately 55 miles from Calexico (H. Tr. 14–15; Tr. 37–38).

At about 6:30 p.m. respondent, of his own accord, drove a brown 1959 Chevrolet pickup, California license G–23731, into the checkpoint on Highway 86, which was then closed (H. Tr. 14; Tr. 37–38). He alighted from the truck and began to wipe off its windshield, it was then raining and the truck had no windshield wipers (H. Tr. 20–21). Shortly before entering the checkpoint, respondent passed Agent Salinas, who had just left the checkpoint and was driving south.

Salinas recognized the truck from the radio alert, U-turned, and followed respondent into the checkpoint (Tr. 38). Agent LeMon, who had remained at the checkpoint, also recognized the truck. LeMon approached the truck and asked respondent "to stand away from the truck" (H. Tr. 16). Meanwhile, Agent Salinas arrived, went "straight to the back of the truck" (Tr. 39) and "dropped the tailgate" (Tr. 47). As Agent Salinas described his actions (Tr. 39):

> [T]here was a plyboard sheet, quite large, covering the bed of the pickup truck. I lifted it and detected a strong odor of marijuana. In between the cracks I could see what appeared to be white paper used to pack marijuana, commonly known as a kilo brick, through the slats, the cracks of the slats of the truck bed.

Salinas then called to Agent LeMon, "'It's here. I can smell it'" (H. Tr. 16), and the agents arrested respondent. Subsequently, two slats were removed from the truck bed, and the presence of marijuana was confirmed (Tr. 40). In all, 120 kilo-size packages of marijuana were removed from the compartment (Tr. 53).

The district court upheld the search of respondent's vehicle, finding that the information given by the informant to Agent Fernan provided sufficient probable cause to justify the resultant detention and inspection. The court held that the informant's reliability had been established and that the detailed nature of his information, "a full and complete description of the truck except for the year, giving the license num-

ber, and color" (H. Tr. 27), suggested that his information was of a first hand nature.

The court of appeals reversed, one judge dissenting, holding that the informant's information did not satisfy the "two-pronged" test requiring both that the government establish the reliability of the informant and that it produce evidence showing the basis of the informant's knowledge, citing *Aguilar* v. *Texas*, 378 U.S. 108, and *Spinelli* v. *United States*, 393 U.S. 410. The dissenting judge would have upheld the search under *Draper* v. *United States*, 358 U.S. 307.

REASONS FOR GRANTING THE WRIT

Broadly stated, this case presents the important issue, as yet unresolved by this Court, whether the practical approach reflected in *Terry* v. *Ohio*, 392 U.S. 1, to temporary detention of suspects for questioning on the basis of suspicion not amounting to probable cause is applicable to limited searches of property. Framed more specifically in terms of the facts of this case, the question is whether an informant's tip that is insufficient under *Aguilar* and *Spinelli* to establish probable cause,[1] and which therefore would not support a

[1] The government urged in its unsuccessful petition for rehearing that the information and the subsequent discovery at the checkpoint of the precise truck described satisfied the requirements of *Draper* v. *United States*, 358 U.S. 307. However, the tension between *Draper* and *Aguilar-Spinelli* is well recognized. *Spinelli* v. *United States*, *supra*, 393 U.S. at 427–429 (White, J., concurring). Since the question whether these particular circumstances gave rise to probable cause under *Draper* turns on singular facts and thus does not appear to raise an issue of general importance meriting review by this Court, our petition is based on the premise that the detailed tip here was insufficient to establish probable cause.

warrant to search a home or arrest a suspect,[5] may nevertheless justify a limited investigatory search, such as the simple inspection of the bed of respondent's open truck that led to confirmation of the informant's tip in the instant case.

The issue is of substantial importance to law enforcement. The effect of the ruling of the court of appeals is to require police officers who entertain well-founded suspicion (not amounting to probable cause) of criminal activity to stand idly by, unable to conduct even a limited investigation entailing minimal intrusion on privacy interests, whenever the investigation entails any kind of search of property (even though, under *Terry*, the considerably more substantial intrusion of a forcible stop and detention, questioning, and possibly a weapons frisk of a citizen would be lawful to investigate the same suspicion).

In cases such as this, which do not implicate the Warrant Clause, "the conduct involved * * * must be tested by the Fourth Amendment's general proscription against unreasonable searches and seizures" (*Terry* v. *Ohio*, *supra*, 392 U.S. at 20). The method of such testing was stated in *Terry* (*id.* at 20–21):

> [I]t is necessary "first to focus upon the governmental interest which allegedly justifies offi-

[5] In view of the exigent circumstances following the tip and the disappearance of the truck from Calexico, there is no question here of the need to procure a search warrant. In any event, as indicated in the preceding footnote, we assume *arguendo* that there was here no probable cause, and thus that no warrant could have been obtained. Moreover, as we have argued in our brief in *Cardwell* v. *Lewis*, No. 72–1603, we do not believe a warrant is ever required for an otherwise reasonable vehicle "search" of the sort that took place here.

> cial intrusion upon the constitutionally protected interests of the private citizen" for there is "no ready test for determining reasonableness other than by balancing the need to search [or seize] against the invasion which the search [or seizure] entails." *Camara* v. *Municipal Court,* 387 U.S. 523, 534–535, 536–537 (1967). And in justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion. * * * [Footnote omitted.]

In assessing "reasonableness," accordingly, *Terry* requires a balancing of the extent of the intrusion by the police and the justification offered to support it. Judged in this manner, the actions of the Customs and Border Patrol agents in this case were wholly reasonable.

An informant of proven reliability, who had on at least five prior occasions provided accurate information in narcotics cases (H. Tr. 6–7), advised that a particular brown Chevrolet pickup truck, California license G–23731, had a quantity of contraband concealed in a secret compartment under the truck's bed (*supra,* p. 3). Armed with this knowledge, Agent Salinas, when he came upon the truck, lifted a plywood sheet covering the truck's bed. This action involved no entry into an enclosed area, no breaking of locks or destruction of property, no general exploratory rummaging or ransacking—in short, no meaningful invasion of either privacy or property interests. As soon as Agent Salinas looked under the plywood board, he smelled the marijuana and observed the kilo

bricks (*supra*, p. 5). When the hard information available to the officer is weighed against his very limited intrusion, they "balance" to support the reasonableness of his actions, even though the information on which the action was predicated was insufficient to establish probable cause and support a search warrant under *Aguilar* and *Spinelli*.[6]

The ultimate issue in this case is therefore whether the officers' conduct is to be judged under "the Fourth Amendment's general proscription against unreasonable searches and seizures" (*Terry*, *supra*, 392 U.S. at

[6] *Aguilar* and *Spinelli*, *supra*, were Warrant Clause cases. In *Aguilar*, the Court held insufficient an affidavit for a warrant to search a suspect's home based on "reliable information from a credible person" that narcotics were kept in his house. The affidavit was held insufficient because it did not reveal "some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant * * * was 'credible' or his information 'reliable'" (378 U.S. at 114). *Spinelli* reaffirmed "*Aguilar's* two pronged test" of informant reliability and "'underlying circumstances'" supporting the informant's conclusions (393 U.S. at 413).

Here, the informant's reliability was established, but there is no testimony in this record as to the "underlying circumstances" upon which the informant based his conclusion that there was marijuana concealed in the secret compartment in the truck bed. In cases involving informer's "tips" it is not uncommon for officers to withhold the "underlying circumstances" from which the informant obtained his information, for to reveal such circumstances would often reveal the identity of the informer, thereby jeopardizing his life or, at the very least, destroying his usefulness as an informer. Nevertheless, we concede that if the information in this record had been the basis of an affidavit in support of a warrant to search a residence, it would not have passed muster under the *Aguilar-Spinelli* test.

20) or the probable cause requirements of *Aguilar* and *Spinelli*. For several reasons, we believe the former standard should govern.

In the first place, *Aguilar* and *Spinelli* involved full-blown searches of homes, as to which rigorous standards are most appropriate. Cf. *Stanford* v. *Texas*, 379 U.S. 476, 481. No such massive intrusions of reasonable expectations of privacy are involved here. The inspection here was of a vehicle, not a home. The vehicle was in a public place, a Border Patrol checkpoint, not on private property (cf. *Coolidge* v. *New Hampshire*, 403 U.S. 443, 463, n. 20). There was no thoroughgoing search of the vehicle; rather, Agent Salinas simply dropped the tailgate of an open-bedded pickup truck and lifted a plywood sheet covering the bed. In stark contrast to the searches in *Aguilar* and *Spinelli*, this limited inspection invaded no legitimate privacy interest of respondent.

This Court approved a considerably more intrusive limited search, on an informer's tip not amounting to probable cause, in *Adams* v. *Williams*, 407 U.S. 143. The Court observed (*id.* at 145–146):

> The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape. On the contrary, *Terry* recognizes that it may be the essence of good police work to adopt an intermediate response. * * * A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be

> most reasonable in light of the facts known to the officer at the time. [Citations omitted.]

The facts of *Adams* are instructive. There Sergeant Connolly—who was patrolling a high-crime area of Bridgeport, Connecticut, late at night—was informed by a person he knew "that an individual seated in a nearby vehicle was carrying narcotics and had a gun at his waist" (*id.* at 144–145). The officer approached the car and asked the occupant to open the door. "When Williams rolled down the window instead, the sergeant reached into the car and removed a fully loaded revolver from Williams' waistband. The gun had not been visible to Connolly from outside the car, but it was in precisely the place indicated by the informant." (*id.* at 145). Connolly then arrested Williams.

The character of the information available to Sergeant Connolly was similar to that known to the officers here. Granted that the inspection here lacked Connolly's self-protective motive; on the other hand, the inspection of the truck bed was far less intrusive of privacy interests than was Connolly's search of Williams' person. In all, "balancing the need to search against the invasion which the search entails" (*Camara* v. *Municipal Court*, 387 U.S. at 523, 537), the inspection here was at least as reasonable as the search approved in *Adams*.

Moreover, lower courts have repeatedly recognized that reasonable and proper police work often entails limited detentions and inspections upon less than probable cause. In *United States* v. *Williams*, 416 F. 2d 4 (C.A. 5), a police officer detained a driver whom he wished to question at gun point when the driver

ignored his order to halt. While the driver's actions had aroused the officer's suspicions, the officer did not, at the time he first detained the driver, have probable cause to believe the driver had committed any crime. The court said (416 F. 2d at 6):

> We believe that this stoppage-by-revolver was, in the circumstances a reasonable "seizure" to prevent Ferino from escaping by car * * *, a temporary "seizure" which did not have to be justified by "probable cause" to believe a particular crime had been committed. * * * [Citation omitted.]

As here, the court observed that the intrusion had been minimal (*id.* at 7):

> [The detention] was a reasonable police practice for that time, that place and those circumstances. By the same token, the conditions were such that the invasion of Ferino's privacy and the disruption of his legitimate activity was very minor.

See also *Rodgers* v. *United States*, 362 F. 2d 358 (C.A. 8) (Blackmun, J.), and *Lipton* v. *United States*, 348 F. 2d 591 (C.A. 9). While these cases involved forcible stops rather than simply a limited search of a relatively unprivate portion of a vehicle, and thus may be factually distinguishable from the instant case, we believe that their holdings are analytically irreconcilable with the result in this case (as is the holding in *Terry*).

In *Terry* v. *Ohio*, the Court fashioned a rule of reason to deal with "[s]treet encounters between citizens and police officers [which] are incredibly rich in diversity" (392 U.S. at 13). There, the Court sanctioned

limited detention, interrogation, and searches of citizens in public places upon reasonable suspicion not amounting to probable cause. Police detection work not involving interrogation of citizens is equally "rich in diversity." We believe good police work would be vastly aided, and Fourth Amendment interests fully protected, by a similar rule with respect to limited, reasonable inspection of vehicles and other objects in public. Where, as here, there is a well-founded suspicion (not amounting to probable cause as defined in *Aguilar* and *Spinelli*) that a vehicle or other object located in a public place contains contraband or evidence of crime, a limited detention and inspection, not amounting to a full search, is reasonable and should be permitted.[7]

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

ROBERT H. BORK,
Solicitor General.
HENRY E. PETERSEN,
Assistant Attorney General.
ALLAN ABBOT TUTTLE,
Assistant to the Solicitor General.

MAY 1974.

[7] Our contention that this kind of limited search of a vehicle on the open highway based on substantial suspicion not amounting to probable cause is consistent with the language and history of the Fourth Amendment is spelled out more fully in our brief *amicus curiae* in *Cardwell* v. *Lewis*, No. 72–1603 (pp. 21–28), a copy of which we are sending to counsel for the respondent.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH DISTRICT

No. 73-2124

UNITED STATES OF AMERICA, PLAINTIFF, APPELLEE,

v.

JOHN ALFRED HAMILTON, DEFENDANT, APPELLANT.

[January 2, 1974]

Appeal from the United States District Court
for the Southern District of California

Before: ALDRICH,[1] ELY and CHOY, Circuit Judges.

ALDRICH, Senior Circuit Judge:

Defendant Hamilton, the driver of a Chevrolet pickup truck, was arrested on August 12, 1972, following a successful search of the vehicle for contraband as a result of information supplied to the United States Border Patrol by an informant. After a non-jury trial he was found not guilty of importing, but guilty of possessing the 264 pounds of marijuana found in the truck, with intent to distribute, in violation of 21 U.S.C. § 841(a)(1). The sole question on defendant's appeal is the legality of the warrantless search.

The same hiatus in the surveillance between the vehicle's apparently lawful entry from Mexico (at

[1] Honorable Bailey Aldrich, United States Senior Circuit Judge, First Circuit, sitting by designation.

2:30 PM) and its apprehension and the discovery of the marijuana (at 6:30 PM) which required a finding of not guilty on the importation count, makes frivolous the government's claim that the "search was the functional equivalent of a border search." We merely note, in passing, that this is not a case of a short hiatus after suspicion had been aroused. *See, e.g., Alexander v. United States,* 362 F.2d 379 (9th Cir. 1966), *cert. denied* 385 U.S. 977; *Leeks v. United States,* 356 F.2d 470 (9th Cir. 1966). Even less supportable is the government's extraordinary assertion that the "plain sight" doctrine embraces objects revealed only as a result of entering the truck and lifting a plywood floorboard. It is conceded that until the plywood was raised, exposing a false compartment, no evidence of marijuana was noted, even by smell. As the Court has said many times, the plain view doctrine is applicable only when there has been no prior unjustified intrusion. *See, e.g.,* discussion in *Coolidge v. New Hampshire,* 403 U.S. 443 (1971).

We turn, therefore, to the district court's finding that the search was supported by probable cause. The facts are these. At about 4:30 P.M. on the day in question one Fernan, a Border Patrol agent was informed by a previously demonstrated reliable informant that a truck, which he pointed out to him parked across the street from the Customs Agency in Calexico, California, had marijuana concealed in a false compartment in the body bed. If the informant gave Fernan any explanation, source or basis for this information the government failed to introduce it. Fernan reported by telephone to Walker, a Customs special agent. The precise nature of what was said is important. According to Walker, the sole testifier, the "informant indicated that there was a false compartment in the bed of this vehicle, and that it contained an unknown

quantity of marijuana." We cannot take Walker's word "indicated" as meaning pointed out the compartment as distinguished from merely stating it existed, because in the sentence almost immediately preceding Walker had used the word "indicated" as clearly meaning by word of mouth. It is true that there were visible plywood boards over the compartment, but no witness suggested that a plywood flooring in a pick-up truck was unusual or suspicious. Even the government did not claim that the testimony of agent Salinas of seeing the compartment after the flooring was removed, or the snapshots then taken, suggested that it was previously visible. Nor do we so construe the record. The burden is on the government, and if we were to draw any inference, it would be that there would be no point in having a false compartment if its existence was apparent.

Having seen the truck, Fernan obviously was able to describe it accurately. Walker went to the window and looked out, but the truck had gone. A general call was sent out. At 6:30 PM a truck meeting the description stopped of the driver's own accord at a then closed highway checkpoint to clean the windshield. Some fortuitously present government agents recognized it, effected the search, and arrested the defendant.

The government asserts that the fact the informant was of proven reliability is all that was needed to establish probable cause for the search. While support may be found for this view, *e.g.*, *Costello v. United States*, 324 F.2d 260 (9th Cir. 1963), *cert. denied* 376 U.S. 930, it is now clear that, as the court said in *United States v. Davis*, 461 F.2d 1026, at 1033 (3rd Cir. 1972), there is a "two-pronged" test. It is necessary to make some showing of the validity of the conclusions made by the reliable informant. *Spinelli*

v. United States, 393 U.S. 410, 416 (1969); *Aguilar v. Texas,* 378 U.S. 108, 114 (1964). This aspect can be satisfied by evidence of "some underlying circumstances" warranting the informant's conclusions in the particular instance, *Travis v. United States,* 362 F.2d 477, at 479 (9th Cir. 1966), *cert. denied* 385 U.S. 885, or by corroboration of his information from other sources, *Draper v. United States,* 358 U.S. 307 (1958); *see Whiteley v. Warden,* 401 U.S. 560, 567 (1971); or, perhaps, by the information itself if it is so detailed as to be inherently reliable. Thus in *Draper v. United States,* ante, where the informant not only described the suspect, but stated that he would be arriving by train from Chicago carrying a brown satchel, the Court considered the subsequent fulfillment of this prophecy to be sufficient corroboration of the informant's statement that the suspect would be carrying contraband. The probative significance of this subsequent event was noted in *Spinelli v. United States,* ante, 393 U.S. at 416–17. In the case at bar all the government had was a statement supported by nothing that was not open and obvious to anyone. We know of no case suggesting that this is enough. *Cf. Whiteley v. Warden,* ante, rejecting informer's unamplified "tip" that described individuals, in a described car, had stolen gold coins.

Finally, the government, in keeping with its other views in this case, offers as an alternative ground the fact that "the information provided was verified." It is hornbook law that ex post facto verification does not satisfy the Fourth Amendment. *Wong Sun v. United States,* 371 U.S. 471 (1963).

Reversed.

CHOY, Circuit, Judge, dissenting:

I respectfully dissent, I would sustain as not clearly erroneous the district court's factual finding that there

was probable cause for the warrantless search. *Costello v. United States,* 324 F.2d 260, 261 (9th Cir. 1963), *cert. denied* 376 U.S. 390 (1964).

Not only was the informant of proven reliability, but also his information was corroborated by government agents (Fernan and Salinas) before Agent Salinas made any attempt to lift the plyboard sheet covering the false compartment in the pickup truckbed to smell the marijuana. The corroborative facts preceding the search and the reasonable inferences therefrom are:

> The well-described truck, which the informant indicated had a false compartment in its bed containing a quantity of marijuana, was parked where the informant said it was.
>
> The plyboard cover to the false compartment in the open truckbed was clearly visible.
>
> Fernan inspected the truck where it was originally parked and saw the false cover.
>
> Salinas saw the plyboard cover and recognized it as covering the false compartment before he raised it.

I find this case indistinguishable from *Draper v. United States,* 358 U.S. 307 (1958). I would not second guess the district judge and say he was clearly erroneous. We are concerned here with whether there was probable cause to search, not with whether a prima facie case to convict for possession of 264 pounds of marijuana was established before Salina made the search.

I would affirm.

APPENDIX B

[The judgment of the court of appeals has been mailed to the Department of Justice, but has not yet arrived. We will file the judgment with the court as soon as it arrives.]

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 73-2124

UNITED STATES OF AMERICA, APPELLEE

v.

JOHN ALFRED HAMILTON, APPELLANT

ON PETITION FOR REHEARING

Before: ALDRICH,[1] ELY, and CHOY, Circuit Judges.

The majority of the original panel (Aldrich and Ely) votes to deny the Petition for Rehearing.

Judge Choy would grant panel rehearing but votes with the majority to reject the suggestion for *en banc* rehearing.

The panel unanimously votes to reject the suggestion that the cause be remanded for an additional hearing in the District Court.

The full court has been advised of the suggestion for an *en banc* hearing, and no judge of the court has requested a vote on the suggestion for rehearing *en banc*. 35(b), Fed. R. App. P.

The petition for rehearing is denied and the suggestion for a rehearing *en banc* is rejected.

WALTER ELY,
United States Circuit Judge.

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[1] Honorable Bailey Aldrich, United States Senior Circuit Judge, First Circuit, sitting by designation.

U.S. GOVERNMENT PRINTING OFFICE 1974

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1726

UNITED STATES OF AMERICA, PETITIONER

v.

JOHN ALFRED HAMILTON

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

Respondent contends that this case is moot.[1] We submit that this contention is frivolous.

As noted in our petition, the opinion of the court of appeals reversing respondent's conviction was published on January 2, 1974, and the government's petition for rehearing was subsequently denied on March 18, 1974. On April 10, 1974, on motion of the Solicitor General, Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari to May 17, 1974. However, no stay of the mandate of the court of appeals was sought or ob-

[1]The Memorandum in Opposition also advances other arguments against certiorari. Since we believe these arguments require no further answer beyond what has already been said in our petition, this memorandum is confined to respondent's claim of mootness.

tained.[2] The mandate accordingly routinely issued on April 15, 1974. On April 22, 1974, the case was routinely placed on the calendar of the district court by the clerk and was dismissed without objection from the United States Attorney, who was unaware of the extension of time to petition which Mr. Justice Douglas had granted. On learning of the Solicitor General's intention to petition for a writ of certiorari, however, the United States Attorney successfully moved in the district court on May 17, 1974, to withdraw the earlier order dismissing the indictment.

1. Issuance of mandate by the court of appeals is immaterial, since the spreading of the mandate does not defeat the jurisdiction of this Court. See *Aetna Casualty Co.* v. *Flowers*, 330 U.S. 464, 467; *Carr* v. *Zaja*, 283 U.S. 52, 53; *The Conqueror*, 166 U.S. 110, 113; *Louisville & Nashville R. Co.* v. *Behlmer*, 169 U.S. 644, 648.

2. Nor does the initial dismissal of the indictment by the district court render this case moot, for the district court later granted the government's motion to withdraw the original order of dismissal and reinstate the indictment. This action was taken 25 days after the order dismissing the indictment. Since this was within the time for appeal, respondent can make no contention that the order was final so as to preclude corrective action by the

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[2]When a court of appeals has simply reversed a conviction without ordering any specific affirmative action to be undertaken thereafter, the government customarily does not seek a stay of mandate simply because it is considering seeking or has sought Supreme Court review, since we are of the view that no stay is necessary to protect our statutorily provided rights of review in this Court. Because the decision whether or not to seek certiorari normally cannot be made by the Solicitor General prior to issuance of the court of appeals' mandate, requirement that a stay be obtained to preserve the government's right of review by this Court would precipitate a flood of such applications for protective purposes.

district court. With the indictment against petitioner thus reinstated, a case and controversy exists; the decision by this Court, if favorable to the government, will finally determine the validity of respondent's conviction. Therefore, the case is not moot and consideration by this Court is appropriate.

3. Finally, respondent's reliance on Rule 48(a) of the Federal Rules of Criminal Procedure is misplaced. Contrary to his assertion, the dismissal of an indictment on the government's motion pursuant to Rule 48(a) is generally perceived as being without prejudice. See *United States* v. *Chase*, 372 F. 2d 453 (C.A. 4); *United States* v. *Arradondo*, 483 F. 2d 980, 983 (C.A. 8); *United States* v. *Davis*, 487 F. 2d 112, 118 (C.A. 5); *DeMarrias* v. *United States*, 487 F. 2d 19, 21 (C.A. 8).[3]

For the reasons stated in our petition and this reply memorandum, it is respectfully submitted that the petition for a writ of certiorari should be granted.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1974.

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[3] *Woodring* v. *United States*, 311 F. 2d 417 (C.A. 8), cited by petitioner for the proposition that a Rule 48(a) dismissal is with prejudice, involved dismissal occurring after the government had presented its case to the jury, thus invoking jeopardy. In *White* v. *United States*, 377 F. 2d 948 (C.A.D.C.), the court of appeals determined from the record that the trial court had specifically intended its dismissal to be with prejudice.

In the instant case, respondent having been convicted in his original trial and the court of appeals having ruled in petitioner's favor on an evidentiary matter, there is no argument that the Double Jeopardy Clause would bar further prosecution, regardless of the finality of the district court's initial action dismissing the indictment. Respondent could thus be reindicted and retried, and the issue of the admissibility of the evidence would be critical to the second trial. Thus, even on the palpably erroneous assumption that the dismissal was somehow not correctable, this case is not moot.